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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1781

HARVEY A. LEVE and WILLIAM H. QUASHA,
d/b/a QUASHA LAW OFFICE,

Petitioners,

vs.

SCHERING CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARTHUR R. SCHMAUDER
MATTHEW FARLEY
SHANLEY & FISHER
Attorneys for Respondent
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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Case Cited

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Statute Cited

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30(b) 4

F.R.C.P.:

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37 11

41(b) 11

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Opinions Below

By Judgment Order dated March 14, 1977, the United States Court of Appeals for the Third Circuit affirmed the Judgment of Dismissal entered on January 8, 1976 by the Honorable Vincent P. Biunno, United States District Court—District of New Jersey. The other District Court

orders cited by Petitioner were addressed to compelling discovery, to a dismissal delayed pending an opportunity for compliance and to the denial of plaintiffs' "informal request" that their dismissal be without prejudice.

Questions Presented

1. Whether pursuant to this Court's teachings in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 49 L.Ed. 2d 747 (1976), the dismissal of this action for failure to provide discovery below (as affirmed by the Third Circuit) was an abuse of discretion by the trial court.

2. Whether this Court wishes to reconsider, modify or reverse its holding in *National Hockey League* v. *Metropolitan Hockey Club, Inc., supra.*

Statement of the Case

Respondent sets forth the salient facts of this case because of certain inaccuracies and misleading statements in the Petition for a Writ of Certiorari.

This action, by a law firm in Bangkok, Thailand to collect an alleged $20,149.85 fee for services, was originally commenced in the United States District Court for the Southern District of New York on July 25, 1973. Upon Motion of the Respondent, it was transferred pursuant to 28 U.S.C. §1404(a) to the District of New Jersey and entered on August 8, 1974. An Answer and a Request for Production of Documents was promptly filed and served on that same date. The documents requested included Petitioners' work file and all supporting time and disbursement records relating to the alleged fee.

On September 9, 1974, the Respondent noticed the depositions of the Petitioners Harvey Leve and William Quasha. In a telephone conversation on September 20, 1974, Petitioners' New York counsel informed counsel for Respondent that copies of certain documents had been lost in transit and sought the postponement of the noticed depositions pending arrival of further copies. This request was granted. After Petitioners failed subsequently to appear for depositions and to produce the requested documents, Respondent moved on December 2, 1974 for a dismissal or an order compelling the depositions and document inspection. On December 9, 1974, both on the telephone and by letter, counsel for the Petitioners advised Respondent's counsel that both the document production and the depositions would take place shortly, perhaps by the end of January. Petitioners made no response to Respondent's pending Motion. The Letter Opinion and Order of Judge Biunno dated January 10, 1975 ordered the Petitioners to appear for depositions by January 30, 1975 and to produce or otherwise object to the document request by January 20, 1975.

When Petitioners failed to comply, Respondent moved again on February 5, 1975 for a dismissal, returnable February 10, 1975. In response, the Petitioners filed an affidavit opposing dismissal and, in a complete reversal of their earlier posture, filed a motion to vacate or limit the deposition and document production notices and court order. In support of their motion, Petitioners filed a lengthy affidavit of Roy M. Cohn, Esq.

Judge Biunno considered both applications in his Letter Opinion and Order dated February 27, 1975 in which Respondent's request for dismissal was granted. Judge Biunno, however, made the dismissal effective March 24, 1975 and suggested to the Petitioners that compliance with

his previous Order prior to March 24, 1975 would be considered if they brought a motion to reconsider the dismissal.

Notwithstanding the District Court's extended indulgence, the Petitioners did not comply with the earlier discovery Orders. Nor was any further motion or other pleading filed explaining Petitioners' failure to comply. Seemingly unconcerned with any discovery rights or procedure, Roy M. Cohn, Esq., counsel for the Petitioners, merely wrote a letter to Judge Biunno on March 24, 1975 and requested that the dismissal be without prejudice.

On April 15, 1975, Judge Biunno denied this "informal request" in a Letter Opinion and Order. Thirty days later, Petitioners filed a Notice of Appeal from Judge Biunno's Order of April 15, 1975 and ". . . from all other orders and rulings heretofore made and entered herein."

Respondent moved before the Court of Appeals for a dismissal of the appeal on the grounds that (1) it was not timely taken and (2) Petitioners had not filed security for costs in the sum of $250 as required by F.R.A.P. 7 and had not provided opposing counsel with a Statement of Issues and a Statement of Contents of Appendix as required by F.R.A.P. 30(b).

Later, Respondent also moved to quash certain exhibits (principally correspondence) which Petitioners had included in their Appendix on Appeal as well as argument in their brief based on such exhibits because the challenged documents had not been filed as pleadings and were not properly part of the record on appeal.

The motions to dismiss were rendered moot by the Third Circuit's dismissal of the appeal on November 20, 1975 by virtue of the fact that the dismissal judgment was not in the form of a "separate document" as required

by F.R.C.P. No. 58. On January 8, 1976, Judge Biunno entered a separate judgment order dismissing the Complaint "with prejudice" and thereafter Petitioners filed a timely Notice of Appeal.

The previously filed briefs were accepted by the Third Circuit in this second appeal, in which the issue was narrowed to whether the dismissal by the trial court was an abuse of discretion. Argument was held before the Court of Appeals on February 24, 1977 and a judgment order was rendered by the Court (Kalodner, Adams and Hunter, Circuit Judges) on March 14, 1977 affirming the judgment of the District Court.

Reasons for Denying the Writ of Certiorari

Petitioners appear to have a confused conception of the rights of litigants under the Federal Rules of Civil Procedure. They cite (on page 15 of their Petition) six procedural steps taken by the Respondent, three of which are proper, if not routine means of discovery and two of which concern Respondent's redress for Petitioners' failure to comply not only with Respondent's request but with *orders* of the District Court. To characterize these actions as "dilatory tactics" which are "not . . . in any way directed toward the merits of the action", requires a certain amount of indifference (a) to the meanings of words in the English language, (b) to the federal court rules, and (c) to the intelligence of all concerned.

I.

There was no abuse of discretion by the court below.

Petitioners' indifference to proper meanings is evident from their repeated assertions of "facts" which are no where found *in the record.*

The death of Mr. Schwartz in September 1974 and the illness of Mr. Manley in December 1974 were *never* presented in pleadings (much less in affidavits) to the District Court as the basis for Petitioners' failure to comply with outstanding discovery requests and court orders. In any event, such misfortunes in no way bear upon Petitioners' failures to provide discovery and to comply with court orders.

After the January 20th and 30th deadlines set by Judge Biunno had expired, *after* Respondents' *second* motion to dismiss, and in lieu of opposition papers, Petitioners filed their first responsive pleadings: a countermotion which completely reversed their earlier position and sought to limit the documents required (to those of their own choosing) and to vacate the required depositions in favor of written Interrogatories. Petitioners' motion papers included affidavits of counsel arguing to limit the already extant discovery order and requests, but the only mention of any personnel problem made on the part of Petitioners' counsel was one *of several* brief excuses offered with respect to their "apparent laxity."

By Letter Opinion and Order dated February 27, 1975, Judge Biunno addressed fully the contentions proffered by Petitioners' counsel and denied their belated application. Respondents' Motion to Dismiss was granted but the Court delayed the effective date until March 24, 1975,

indicating that an application to vacate the dismissal would be entertained if the required discovery of the Petitioners had occurred by that date.

Petitioners did nothing. The "personnel problems" in the offices of Petitioners' counsel were mentioned in Mr. Cohn's letter to Judge Biunno dated March 24, 1975, the last day of Judge Biunno's "grace period" for Petitioners' compliance, and more than seven months after the initial discovery notice was served. This letter, however sought only that the dismissal be "without prejudice." In his April 15, 1975 Letter Opinion and order Judge Biunno denied this "informal request". Significantly, *Petitioners* never filed Affidavits or proper motion papers *at any time* indicating that counsel's problems were the basis of their failure to comply.

Counsel's "personnel problems" were proffered after Petitioners' counter motion seeking to limit discovery was denied, and then only for the *limited* purpose of trying to have the dismissal "without prejudice". Apparently the diminution of counsel's office staff[1] did not prevent the preparation of papers and extensive argument (in Petitioners' counter-motion) concerning why they should not be required to comply with the outstanding discovery requests and orders. Mr. Manley's medical leave at the end of December in no way could have hampered production of documents requested over four months earlier and the court ordered depositions would have taken scarcely more time than Petitioners' motion papers in February. Petitioners are less than candid when they urge in their first

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[1] It should be noted that in both courts below, the problems of Petitioners' counsel never caused them to miss a deadline. Petitioners never *complied* by a deadline, but always put in some paperwork on the last day to excuse or explain their lack of compliance.

Question Presented on page 3 that their ". . . failure to comply with discovery orders is *admittedly* due to geographic distances and the death and illness of counsel". Since their counter-motion, they have continually argued that they should not be made to comply. Their argument as to "personnel problems" is a sham.

Roy M. Cohn, Esq. was the attorney handling this matter from its inception. He signed Petitioners' complaint, the affidavit in Petitioners' belated counter-motion and the March 24, 1975 letter to Judge Biunno. He also argued Petitioners' appeal in the Third Circuit. No proffer was ever made by Petitioners as to Mr. Cohn's inability to tend their case.

With respect to the costs of discovery, Petitioners further exhibit the ability to act in contradiction to their statements. The order with respect to depositions related only to the Petitioners, Harvey Leve and William Quasha. No order was entered with respect to depositions requested by Respondent of two other members of Petitioners' firm who allegedly performed work for the Respondent. Moreover, Petitioners' counsel had previously agreed to the depositions. When Petitioners' belated motion as to both the depositions and document production were considered by the District Court, Judge Biunno correctly concluded that the term of an engagement for legal services warrant depositions. Moreover, the documents sought consisted primarily of the Petitioners' file for the work rendered and the related internal timekeeping records. It is inconceivable how Petitioners (themselves lawyers) could later argue that these documents and the transporting of them could be "burdensome" nearly two years after they commenced their suit. Nevertheless, in the face of previous discovery demands and notices, agreement by counsel to comply and a court order, they sought to vacate

their discovery obligations. Judge Biunno, despite Petitioners' belated request, *considered* it and denied it in view of the nature of the case and the proceedings to date.

Petitioners' failure to comply—despite repeated extensions of time—was deliberate. They were unwilling to expose their case and have it decided under the Court's rules. A dismissal under such circumstances cannot be deemed abuse of discretion by the trial court.

Petitioners continued vacillation in this regard is evident in their Petition itself. On Page 18, Petitioners' effort to distinguish *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 49 L.Ed. 2d 747 (1976), is based on a *reargument* of the propriety of the order compelling the depositions. On the other hand, at page 16, Petitioners urge that the court ordered deposition deadline of January 30, 1976 was unrealistic and itself the cause of Petitioners' failure to comply. This new contention ignores two facts: first, the depositions could have taken place at any time through March 24, 1975 and secondly, in December, 1974 Petitioners' counsel had indicated their depositions could be anticipated by the end of January.

Given that Petitioners' counsel had the demonstrated wherewithal all during this period to reverse their prior agreement to produce Petitioners and to file a countermotion as to discovery, a failure by Judge Biunno to "appreciate" the problems suffered by counsel cannot give rise to the abuse of discretion clearly required before Judge Biunno's judgment is reversed.

Petitioners' conduct was demonstrably willful and in bad faith. The District Court appropriately dealt with the matter.

II.

This Court's decision in *National Hockey League* v. *Metropolitan Hockey Club, Inc.* controls this case.

Counsel for the Respondent argued before the Third Circuit that the Court's ruling in *National Hockey, supra,* controlled this case. Petitioners have failed to distinguish the instant case and the teachings of *National Hockey* merit their application here.

Petitioners err in stating that the respondent in *National Hockey* had seventeen months to answer Interrogatories. The actual time period involved related to a few months in 1974 immediately prior to the date first set for trial. Respondent would point out that the discovery notices herein were served in August and September 1974 and that Petitioners' through their counsel had agreed to compliance as late as December 1974. Only after Petitioners reversed their earlier posture, with motions in February, 1975, did the ensuing court order give them until March 24, 1975, six months from the original Notice and *nearly two years* since their suit had been instituted, 1973.

Additionally, *National Hockey* involved an extensive antitrust action with to-be-expected difficulties in responding to more than a thousand interrogatories. Nevertheless, this Court properly lodged the primary responsibility for control of the litigation with the "on-site" judgment of the trial court. Certainly a two-party action over a legal fee warrants no less deference to the District Court below.

Petitioners suggest that this Court reconsider *National Hockey* and make the astonishing statement that "the federal courts will now apparently dismiss a viable cause of action *merely due to the passage of time* in which pre-

trial discovery is pending *without regard to the attendant facts and circumstances.*" (Emphasis added, pp. 18-19). There then follows argument based upon hypothetical conduct which is totally irrelevant to the within case.

This Court's teaching in *National Hockey* wisely balanced the preference of justice for a decision on the merits with a pragmatic realization of the need for control of the litigation before the courts below. The policy concern was directed to both those whose conduct warrants dismissal as well as those who "might be tempted to such conduct." Few litigants could fill the shoes of the latter, if indeed, not the former group, as do Petitioners. Interestingly, this court suggested in *National Hockey* that the dilatory party in that case might "faithfully comply with all future orders entered." Petitioners herein do not even so offer and in fact, although indirectly, still urge that the original order compelling their depositions was improper.

Not only is this Court's opinion in *National Hockey* as to the *deterrent* effect of the dismissal sanction well taken, but equally important is the reposing of that decision with the *trial court's* discretion. Federal Rule of Civil Procedure Number 37 was intended to provide the trial courts with the sanction of dismissal. Rule 41(b) provides that such dismissal shall be deemed to be "on the merits" unless the *trial judge* in *his* discretion rules otherwise.

A clear reading would indicate an initial intention for all dismissals to be "on the merits" leaving the District Court the discretion in appropriate, but not in all or even most, cases to give a dismissed party an opportunity to try again. The trial judge's discretion in this regard should require only a reasonable basis and the record below in this case cannot be said to lack support for Judge Biunno's decision.

CONCLUSION

For the reasons set forth above, Respondent urges that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

ARTHUR R. SCHMAUDER
MATTHEW FARLEY
SHANLEY & FISHER
Counsel for Respondent
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220